Pilecon Realty Sdn Bhd v Public Bank Bhd & Ors and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–71 AND 72 OF 2011(W) AND 02–73 AND 74 OF 2011(W)
ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, ZALEHA ZAHARI AND SULONG MATJERAIE FCJJ
18 JANUARY 2013

Banking — Securities for advances — Banking facilities — Charge Statutory right of chargee under National Land Code — Restrictions by s 8(2A) of the Bankruptcy Act 1967 ('BA') — Issue of security not realised within six months of winding up order — Whether s 8(2A) of the BA apply in company liquidation — Reliance of secured creditor on security for full satisfaction

The bank granted a banking facility of RM20m to one Transbay Ventures Sdn Bhd ('Transbay') and the facility was secured by a charge over a piece of land ('the said property') belonging to Transbay ('the charge'). Clauses 2 and 30 of the terms of the charge provided that the prescribed interest 'shall be payable until full settlement'. When Transbay defaulted in repayment, the bank filed a suit against Transbay to recover the sums then outstanding and judgment was entered against Transbay. Transbay was wound up and the liquidators took steps to realise the said property. The said property was sold by way of a tender exercise where BSEL Waterfront was the successful bidder. A sale and purchase agreement was then executed between the liquidators and BSEL Waterfront. Clause 6 of the SPA expressly provided that the proceeds of the sale of the said property would be utilised, for payment of the redemption sum to the bank, and the balance, for distribution to other creditors of Transbay pursuant to s 292 of the Companies Act 1965 ('the Act'). The liquidators then requested the bank to furnish a statement of the redemption sum to enable the charge in favour of the bank to be discharged. Pilecon Realty was an unsecured creditor to whom Transbay was indebted in the sum of RM2,996,680.66. Pilecon Realty took the position that the bank was not entitled to interest subsequent. Pilecon Realty then applied for directions of the court and/or for the court to determine the proper basis of calculating interest on the capital sum owed to the creditors of Transbay, the date interest may be computed up to, and the amount Transbay has to pay the bank in respect of the debt owed. Pilecon Realty relied on s 40(3) and s 43(6) of the Bankruptcy Act 1967 ('BA') and to support their contention that the interest payable to the bank ceased to accrue after the date Transbay was wound up. The liquidators sought the court's directions as to whether the bank was entitled to charge interest at the contractual rates on the amount owed by Transbay after the date of Transbay's winding up to the date of full payment. On appeal, the Court of Appeal

allowed Pilecon Realty's appeal. In the present appeal, the questions of law that arose were: whether the statutory right of a chargee under the National Land Code to rely on his security to obtain full satisfaction of the indebtedness owed to him, was restricted by s 8(2A) of the BA where such security was provided by a company which was later wound up under the provisions of the Act 1965; and the security was not realised within six months of the winding up order; and whether s 8(2A) of the BA apply in a company liquidation situation where the secured creditor relies on his security for full satisfaction. The appellant submitted that the learned High Court judge was right in ruling that the bank relying on his security, was outside the liquidation and entitled to the contractual interest. It was further submitted that the Court of Appeal erred in ruling that s 8(2A) of the BA applied to a company in liquidation situation and in limiting the bank's entitlement to interest to a maximum period of six months from the date Transbay was wound up.

Held, dismissing the appeals and allowing the cross-appeals with costs:

(1) The duty of the courts is to make a construction to cure the mischief and advance the remedy. It is not the court's duty either to add or to take away the meaning of the words of a statute unless there were good reasons for thinking that the Legislature had intended to limit its operation. For the courts to limit the application of a certain provision when the Legislature had failed to express such an intention would be to usurp the functions of the Legislature which was not within the competence of the courts to do. The duty of the courts is to give full effect to the language of the law. The function of the courts is to construe the language of the referral and related provisions as they stand, to give effect to the purpose of enacting the provision, and the mischief which existed which the Legislature sought to eliminate (see paras 42–43).

(2) Section 8, and in particular, sub-s (2A) of the BA, were clear and unambiguous. In the absence of an express provision limiting its application, there was no reason to limit its application only against a bankrupt and not to a wound up debtor. Upon a true construction of s 4(1) and 4(2) of the Civil Law Act 1956, s 291(1) and (2) of the Act, s 8(2A) of the BA was equally applicable to a secured creditor in relation to a winding up situation (see para 46).

(3) On reading of s 8(2A), a secured creditor is given a timeline of six months to sell the charged property failing which they would not be entitled to interest. Since the charged property was realised some two years six months after the winding up of Transbay, the bank had failed to meet the statutory limit of six months under s 8(2A) of the BA. As such the bank should not be entitled to any interest. The Court of Appeal had therefore erred in allowing interest for period a six months (see para 49).

[Bahasa Malaysia summary

Bank telah memberikan kemudahan perbankan sejumlah RM20 juta kepada Transbay Ventures Sdn Bhd ('Transbay') dan kemudahan itu telah dijamin oleh gadaian atas sebidang tanah ('hartanah tersebut') yang dimiliki Transbay ('gadaian tersebut'). Fasal 2 dan 30 kepada terma-terma gadaian tersebut memperuntukkan bahawa kepentingan yang ditetapkan 'hendaklah perlu dibayar sehingga penyelesaian sepenuhnya'. Apabila Transbay gagal membuat bayaran balik, bank tersebut telah memfailkan guaman terhadap Transbay untuk mendapat balik jumlah yang masih tertunggak dan penghakiman telah dimasukkan terhadap Transbay. Transbay telah digulungkan dan penyelesai telah mengambil langkah untuk merealisasikan hartanah tersebut. Hartanah tersebut telah dijual melalui pelaksanaan tender di mana BSEL Waterfront merupakan pembida yang berjaya. Satu perjanjian jual beli dengan jelas memperuntukkan bahawa hasil jualan hartanah tersebut akan digunakan untuk bayaran jumlah penebusan kepada bank tersebut, dan bakinya, untuk diagihkan kepada pemiutang-pemiutang Transbay yang lain menurut s 292 Akta Syarikat 1965 ('Akta tersebut'). Penyelesai-penyelesai kemudian meminta bank tersebut menyediakan penyata untuk jumlah penebusan itu bagi membolehkan gadaian tersebut yang menyebelahi pihak bank tersebut dilepaskan. Pilecon Realty adalah pemiutang tak bercagar yang mana Tranbay berhutang sejumlah RM2,996,689.66. Pilecon Realty telah membuat keputusan bahawa bank tersebut tidak berhak mendapat faedah berikutya. Pilecon Realty kemudian telah memohon arahan mahkamah dan/atau untuk mahkamah menentukan asas sewajarnya untuk mengira faedah jumlah modal yang terhutang kepada pemiutang-pemiutang Transbay, tarikh faedah boleh dikira, dan jumlah yang perlu dibayar Transbay kepada bank tersebut berkaitan hutang yang terhutang. Pilecon Realty bergantung kepada ss 40(3) dan 43(6) Akta Kebankrapan 1967 ('AK') untuk menyokong hujah mereka bahawa faedah yang perlu dibayar kepada bank tersebut tidak lagi terakru selepas tarikh Transbay digulung. Penyelesai-penyelesai memohon arahan mahkamah berhubung sama ada bank tersebut berhak mengenakan faedah pada kadar kontraktual ke atas jumlah yang terhutang oleh Transbay selepas tarikh penggulungan Tranbay sehingga tarikh bayaran penuh. Atas rayuan, Mahkamah Rayuan telah membenarkan rayuan Pilecon Realty. Dalam rayuan ini, persoalan-persoalan undang-undang yang timbul adalah: sama ada hak statutori pemegang gadaian di bawah Kanun Tanah Negara untuk bergantung kepada cagarannya untuk memperoleh keseluruhan keberhutangan yang terhutang kepadanya, disekat oleh s 8(2A) AK di mana cagaran sedemikian diperuntukkan oleh syarikat yang kemudian digulung di bawah peruntukan-peruntukan Akta 1965; dan cagaran itu tidak direalisasikan dalam tempoh enam bulan dari perintah penggulungan di mana pemiutang bercagar bergantung kepada cagarannya untuk pelaksanaan penuh. Perayu telah berhujah bahawa hakim Mahkamah Tinggi adalah betul untuk memutuskan bahawa bank tersebut yang bergantung kepada cagarannya adalah di luar

penyelesaian dan berhak terhadap faedah kontraktual. Selanjutnya dihujahkan bahawa Mahkamah Rayuan terkhilaf dalam membuat keputusan bahawa s 8(2A) AK terpakai ke atas syarikat dalam keadaan likuidasi dan dalam menghadkan hak bank tersebut ke atas faedah sehingga tempoh maksimum enam bulan dari tarikh Transbay digulung.

Diputuskan, menolak rayuan-rayuan dan membenarkan rayuan-rayuan balas dengan kos:

(1) Kewajipan mahkamah adalah untuk mencari remedi untuk kerosakan itu dan mengemukakan remedi itu. Ia bukan kewajipan mahkamah sama ada untuk menambah atau mengeluarkan maksud perkataan-perkataan statut kecuali terdapat alasan-alasan baik untuk berfikiran sedemikian bahawa Badan Perundangan telah berniat untuk menghadkan operasinya. Untuk mahkamah menghadkan pemakaian peruntukan tertentu jika Badan Perundangan gagal menyatakan suatu niat akan mengambil alih fungsi-fungsi Badan Perundangan yang bukan dalam kompeten mahkamah untuk dilaksanakan. Kewajipan mahkamah adalah untuk memberi kesan penuh kepada bahasa perundangan. Fungsi mahkamah adalah untuk mentafsir bahasa peruntukan-peruntukan rujukan dan berkaitan sebagaimana dinyatakan, untuk memberi kesan terhadap tujuan penggubalan peruntukan itu, dan kerosakan yang wujud yang mana ingin dihapuskan oleh Badan Perundangan (lihat perenggan 42–43).

(2) Seksyen 8, dan khususnya, sub-s (2A) AK, adalah jelas dan tak taksa. Dengan ketiadaan peruntukan nyata yang menghadkan pemakaiannya, tiada alasan untuk menghadkan penggunaannya hanya terhadap seorang bankrap dan bukan terhadap penghutang yang digulungkan. Atas penggubalan sebenar s 4(1) dan (2) Akta Undang-Undang Sivil 1956, ss 291(1) dan (2) Akta, s 8(2A) AK adalah juga terpakai terhadap pemiutang bercagar yang berkaitan situasi keadaan penggulungan (lihat perenggan 46).

(3) Dengan membaca s 8(2A), seorang pemiutang bercagar diberi tempoh masa enam bulan untuk menjual hartanah yang digadaikan dan jika gagal mereka tidak berhak mendapat faedah. Oleh kerana hartanah yang digadaikan telah direalisasikan dua tahun enam bulan selepas penggulungan Transbay, bank tersebut telah gagal mematuhi had masa enam bulan itu di bawah s 8(2A) AK. Oleh itu bank tersebut tidak berhak mendapat apa-apa faedah. Mahkamah Rayuan dengan itu terkhilaf kerana membenarkan faedah untuk tempoh enam bulan (lihat perenggan 49).]

Notes

For a case on banking facilities, see 1(2) *Mallals' Digest* (4th Ed, 2012 Reissue) para 2663.

Cases referred to

Majlis Amanah Ra'ayat v Official Receiver, Malaysia [1984] 1 MLJ 173, FC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 8, 8(1), (2), (2A), 40(3), 42, 43(4), (6), Schedule C para 9
Civil Law Act 1956 s 4, 4(1), (2)
Companies Act 1965 ss 237(3), 291, 291(1), (2), 292
National Land Code

David Morais (David Morais) in Civil Appeal Nos 02()–71–11 of 2011(W) and 02()–72–11 of 2011(W) for the appellants.
Benjamin John Dawson (Ooi Ai Yen with him) (Benjamin John Dawson) in Civil Appeal Nos 02()–73–11 of 2011(W) and 02()–74–11 of 2011(W) for the appellants.
Benjamin John Dawson (Ooi Ai Yen with him) (Benjamin John Dawson) in Civil Appeal Nos 02()–71–11 of 2011(W) and 02()–72–11 of 2011(W) for the first respondent.
Hoi Jack S'hg (Lee Hishamuddin Allen & Gledhill) in Civil Appeal Nos 02()–71–11 of 2011(W) and 02()–72–11 of 2011(W) for the second and third respondents.
David Morais (David Morais) in Civil Appeal Nos 02()–73–11 of 2011(W) and 02()–74–11 of 2011(W) for the first respondents.
Hoi Jack S'hg (Lee Hishamuddin Allen & Gledhill) in Civil Appeal Nos 02()–73–11 of 2011(W) and 02()–74-11 of 2011(W) for the second and third respondent.

Zaleha Zahari FCJ (delivering judgment of the court):

[1] Public Bank Bhd ('the bank') obtained leave on 9 November 2011 to appeal to the Federal Court against the whole of the decision of the Court of Appeal dated 13 September 2011 on the following questions of law:

(a) whether the statutory right of a chargee under the National Land Code 1965 to rely on his security to obtain full satisfaction of the indebtedness owed to him, is restricted by s 8(2A) of the Bankruptcy Act 1967 where:

(i) such security is provided by a company which is later wound up under the provisions of the Companies Act 1965; and

(ii) the security was not realised within six months of the winding up order;

(b) does s 8(2A) of the Bankruptcy Act 1967 apply in a company liquidation situation where the secured creditor relies on his security for full satisfaction?

[2] Pilecon Realty Sdn Bhd ('Pilecon Realty') had also, on the same date, 9 November 2011, obtained leave to cross-appeal to the Federal Court against part of the decision of the Court of Appeal dated 13 September 2011 on the following question of law:

> Whether a secured creditor is entitled to any interest in respect of its debts after the making of a winding up order if it does not realise its security within six months from the date of the winding up order.

[3] The issue for determination in this case is, what is the interpretation to be given to s 8(2A) of the Bankruptcy Act 1967 (subsequently referred to as 'the BA').

BACKGROUND

[4] The background facts are as follows: The bank granted a banking facility of RM20m to Transbay Ventures Sdn Bhd ('Transbay') upon terms as set out in a loan agreement dated 26 June 1998. The facility was secured by a charge over a piece of land ie HS (D) 256676, PTB 20214, Bandar Johor Bahru, Negeri Johor Darul Takzim ('the said property') belonging to Transbay vide Presentation No 32284/98 Jilid 4296 Folio 31 dated 26 June 1998 ('the charge') in favour of the bank. The terms of the charge provides that the prescribed interest 'shall be payable until full settlement' (cll 2 and 30).

[5] Transbay defaulted in repaying the said loan. The bank then instituted Kuala Lumpur High Court Suit No D3–22–2239 of 2001 against Transbay to recover the sums then outstanding. Judgment was entered against Transbay on 22 August 2003.

[6] Vide High Court Johore Bahru Originating Summons No MT2 24–493 of 2002 the bank, as chargee, obtained an order for sale of the said property to be sold by way of public auction on 7 October 2003.

[7] The bank had also, vide High Court Kuala Lumpur Winding Up Petition No D7–28–13 of 2005, on 7 January 2005, applied to wind up Transbay. Transbay was wound up vide order dated 27 January 2006.

[8] Ooi Woon Chee ('the first respondent') and one Gan Ah Tee were then appointed as liquidators of Transbay. Gan Ah Tee however resigned as a liquidator, which resignation was accepted by the court on 27 July 2007. Ong Hock An ('the third respondent') was then appointed in his place to act jointly and/or severally with Ooi Woon Chee (jointly referred to as 'the liquidators').

[9] The liquidators took steps to realise the only property of value of

Transbay, ie the said property. The said property was not sold by way of public auction pursuant the order for sale dated 7 October 2003 but by way of a tender exercise. Arising from a tender exercise, BSEL Waterfront was the successful bidder of the said property. A sale and purchase agreement was then executed between the liquidators and BSEL Waterfront on 22 July 2008 ('the SPA'). Clause 6 of the SPA expressly provides that the proceeds of the sale of the said property would be utilised, for payment of the redemption sum to the bank, and the balance, for distribution to other creditors of Transbay pursuant to s 292 of the Companies Act 1965 ('the Companies Act').

[10] The liquidators then requested the bank to furnish a statement of the redemption sum to enable the charge in favour of the bank to be discharged. The statement of account issued by the bank dated 31 December 2008 shows that the principal sum outstanding was RM27,544,126.75, interest was RM14,003.907.71 whilst other fees and charges was RM809,507.13. The bank's position was that, as long as its security had not been realised, it was entitled to charge interest at the default rate as prescribed in the loan agreement.

[11] Pilecon Realty is an unsecured creditor to whom Transbay was indebted in the sum of RM2,996,680.66. Besides Pilecon Realty, Transbay was indebted to Johor Coastal Development Sdn Bhd in the sum of RM29,077,149.97, and Pilecon Engineering Bhd, a sum of RM21,105,816.88.

[12] Pilecon Realty took the position that the bank was not entitled to interest subsequent to the date Transbay was wound up (ie 27 January 2006). Pilecon Realty then, vide notice of motion dated 15 July 2009 (encl (155)), applied for directions of the court and/or for the court to determine the proper basis of calculating interest on the capital sum owed to the creditors of Transbay, the date interest may be computed up to, and the amount Transbay has to pay the bank in respect of the debt owed. Pilecon Realty relied on ss 40(3) and 43(6) of the BA to support their contention that the interest payable to the bank ceased to accrue after the date Transbay was wound up.

[13] The liquidators in turn, by notice of motion also dated 30 July 2009 (encl (157)), pursuant to s 237(3) of the Companies Act, sought the court's directions as to whether the bank was entitled to charge interest at the contractual rates on the amount owed by Transbay after the date of Transbay's winding up to the date of full payment.

THE HIGH COURT JUDGE'S DECISION

[14] Enclosures (155) and (157) were heard together. On 7 September 2009, the High Court judge's findings were as follows:

In respect of encl 155, my ruling is that the interest is claimable, on the authorities cited, up to the date of the filing of winding up, if the bank brings itself within the liquidation. So encl 155 is allowed subject to that qualification. Each party to pay for its own costs.

In respect of encl 157, my finding is that the petitioner is outside the liquidation. The petitioner has not submitted its proof of debt to the liquidator. In *Re Hong Huat Realty (M) Sdn Bhd United Asian Bank Bhd v Hong Huat Realty (M) Sdn Bhd* [1987] 2 MLJ 502, Shankar J at p 506 cited with approval a passage from Buckley on Insolvency that mere presentation of a petition does not bring the petitioner within a liquidation and by doing so the petitioner did not give up his security. Therefore the application in 157 is allowed.

THE COURT OF APPEAL'S DECISION

[15] As earlier mentioned, before the High Court, Pilecon Realty relied on ss 40(3) and 43(6) of the BA in support of their contention that the interest payable to the bank ceased to accrue after Transbay was wound up. Before the High Court, no reliance was placed on s 8(2A) of the BA. Neither was s 8(2A) of the BA mentioned in the original memorandum of appeal filed by Pilecon Realty. Pilecon Realty however amended their memorandum of appeal to include a new issue for determination of the Court of Appeal, whether s 8(2A) of the BA read with s 291 of the Companies Act was applicable in a company liquidation situation.

[16] On 13 September 2011 the Court of Appeal allowed Pilecon Realty's appeal and the decision of the High Court judge was set aside, each party to bear their own costs. The broad grounds of the Court of Appeal states as follows:

Unanimous. Upon a true construction of s 4(1) and (2) of the Civil Law Act 1956, s 291(1) and (2) of the Companies Act 1956; and s 8(2A) of the Bankruptcy Act 1967, we are of the view that the computation of interest is for a maximum period of six months as stated in s 8(2A). We are also of the view that s 8(2A) applies to bankruptcy as well as company winding up.

In the circumstances, we hold that the learned judge of the High Court has erred in extending the interest beyond the six-month limit prescribed in s 8(2A)…

[17] Leave to appeal against the decision of the Court of Appeal was granted by the Federal Court on the questions of law as earlier set out in this judgment.

THE APPELLANT'S SUBMISSIONS

[18] En Dawson submitted that the rights of a secured creditor in the event

of liquidation of a company is firstly, a proprietary right against the property over which security was taken. Secondly, a personal right against the company. Liquidation, according to him, does not interfere with the security rights of a secured creditor. A person is said to claim in liquidation when he submits his proof of debt with intent to participate and receive dividends from the company. According to him s 4(1) and (2) of the Civil Law Act only applies in respect of a claim in liquidation against the company.

[19] En Dawson submitted that sub-s (2A) inserted into s 8 of the BA with effect from 17 January 1992 was not applicable to a winding up situation for the following reasons. He was of the view that s 8(2A) had a social rehabilitative objective which was not applicable to the winding up of a company. The purpose for the insertion of sub-s (2A) into s 8 was to alleviate the burden and mitigate the full force of the law of insolvency on a bankrupt, by limiting the interest payable to the date of the receiving order and to remove the obligation to pay continuing interest.

[20] The Legislature did not intend s 8(2A) of the BA to apply to a company liquidation situation by reason of the absence of a corresponding legislative intervention in the Companies Act affecting the rights of a secured creditor in a winding up situation.

[21] There is no reason to encourage insolvent companies to continue to trade. Their existence pose a serious risk to the commercial community. Such companies must be promptly liquidated before they incur further liabilities to deter them from setting up a company, incurring liabilities and insulating themselves from any personal financial responsibility. According to him ss 40(3) and 43(6) of the BA were also not applicable.

[22] En Dawson submitted that s 291(2) of the Companies Act, which incorporates the bankruptcy rules in relation to a claim against the company in liquidation in a proof of debt situation, has no application outside the ambit of s 291(2). Such a creditor stands outside the liquidation. Section 291(2) of the Companies Act is expressly subject to s 292, the provision dealing with priority in respect of unsecured debt. Section 291's reference to rights of secured and unsecured creditors, according to the appellant's counsel, refers to claims by them against the company in liquidation, not against the security. The bank's rights as a secured creditor are not impaired and the bank was accordingly entitled to rely on the charge to satisfy the interest accruing on the debt until full satisfaction.

[23] The learned High Court judge was, according to him, right in ruling that the bank relying on his security was outside the liquidation and entitled to the contractual interest. The Court of Appeal erred in ruling that s 8(2A) of the

BA applied to a company liquidation situation and in limiting the bank's entitlement to interest to a maximum period of six months from the date Transbay was wound up.

THE RESPONDENT/ CROSS APPELLANT'S SUBMISSIONS

[24] In a normal situation the bank, as chargee, would be entitled to its secured debt and judgment interest. In this case however, by exerting pressure by winding up Transbay, the bank had submitted itself to the provisions of the Companies Act and the BA.

[25] Dato' David Morais the respondents' counsel, submitted that on the facts of this case the bank was only entitled to be paid the principal sum of RM13,860,089.29 and not entitled to any interest after Transbay was wound up (27 January 2006). The effective date for debts provable in bankruptcy is the date of the receiving order (s 40(3) of the BA). Once a receiving order was issued, no creditor may claim against the debtor's property except as directed by s 8(1) of the BA.

[26] On s 8 of the BA, his submissions was this. Section 8(1) was applicable to all secured and unsecured creditors, save that s 8(2) expressly provides that secured creditors are exempted. Section 8(2A) however qualified that right of secured creditors by providing that, notwithstanding s 8(2), a secured creditor is not entitled to interest if he does not realise his security within six months. Parliament's intention in inserting sub-s (2A) into s 8, according to him, was to prevent secured creditors from taking unfair advantage of their security to the prejudice of the debtor or the unsecured creditors.

[27] He submitted that the rationale behind s 8(2A) of the BA in a bankruptcy was equally applicable to a company winding up. What was being addressed by s 8(2A) was the fact that a secured creditor would unfairly expand its share of the debtor's assets, thereby prejudicing the rights of both the debtor (shareholders) and their unsecured creditors. He submitted that it would not be correct to discriminate against the unsecured creditors of persons and the unsecured creditors of a company. In both situation, the unsecured creditors are at the mercy of a secured creditor who sits on his security, accruing interest, with increasing unfairness to unsecured creditors. This unfairness was present in both bankruptcy and winding up. It was accordingly important for s 8(2A) to be construed to be applicable to companies winding up as well.

[28] Section 8(2A) of the BA is applicable to a winding up situation pursuant to s 4 of the Civil Law Act and/or s 291(2) of the Companies Act. Section 4 of the Civil Law Act applies to winding up of companies. Section 291(2) of the Companies Act and s 43(6) of the BA applies to an insolvent

company. The combined effect of all of these provisions must be interpreted to mean that the cut off date for determination of interest of an insolvent company is the date of the order of winding up. *Majlis Amanah Ra'ayat v Official Receiver, Malaysia* [1984] 1 MLJ 173 was cited as authority for this proposition.

[29] The Court of Appeal's interpretation of s 8(2A) that the bank was entitled to six months' interest was not in accord with the clear and plain meaning of the words used in the said section. Section 8(2A) states that 'Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order'.

[30] Any so-called security rights the bank relies on in order to claim against Transbay's property is expressly subject to s 8(2A). Under s 8(2A) read together with s 8(1) and 8(2), regardless of his security, a secured creditor is not entitled to have priority over unsecured creditors in relation to any claim for interest if he fails to realise his security promptly.

[31] This court was urged to dismiss the bank's appeals, and to allow Pilecon Realty's cross-appeals.

DECISION

[32] What is in issue in this case is, whether the amendment to s 8 of the BA, the insertion of a new sub-s (2A) with effect from 17 July 1992, is be limited in its application to secured creditors in a bankruptcy situation or whether it is also applicable to secured creditors in a winding up situation?

[33] Prior to the insertion of sub-s (2A) into s 8 of the BA, the position was this. Under s 8(1) of the BA, when a receiving order is made against a debtor, the director general of insolvency becomes the receiver of the property of the debtor and thereafter, except as provided by the BA, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[34] An exception to this prohibition is provided in s 8(1) of the BA. Secured creditors is allowed to realise or otherwise deal with their security as if s 8 had not been passed.

[35] Paragraph 9 of Schedule C to the BA (the rules which must be observed with respect to the mode of proving debts, pursuant to s 42 states if a secured creditor realises his security, but there is still an outstanding amount due under the debt, he may prove for the balance due to him after deducting the net amount realised. The secured creditor will then participate in a share in the balance of the assets of the debtor together with the unsecured creditors. The balance amount due to the secured creditor will rank pari passu, under sub-s 43(4) of the BA, with the debts proved by the unsecured creditors. Under the BA, payment of interest to the secured creditors from the date of the receiving order has been removed by Act A1197, even if there is a surplus of assets after payment of the sums due on the date of the receiving order (s 43(5) and 43(6) of the BA).

[36] Thus, prior to the insertion of sub-s (2A) into s 8 of the BA, a secured creditor who delays in realising his security and continues to charge interest on the amount due to him may cause unfairness to unsecured creditors. There is a possibility that the value of the security when realised would be insufficient to meet the repayment of the outstanding amount due and no balance left over from the proceeds of realisation to go into the pool of assets to be shared by unsecured creditors. If the proceeds were insufficient to pay the amount due to the secured creditor and he participates in the balance of the debtor's assets, there will be more creditors sharing the pool of the remainder of the debtor's assets. The net effect of this would be that the dividend payable to each creditor would be smaller thus reducing the likelihood of the debtor's application for discharge later being favorably considered.

[37] If however a secured creditor acts promptly and realises the security upon which the receiving order was made, no further interest will be payable. The proceeds obtained upon the realisation of the property may be sufficient to meet the full amount due to the secured creditor, and the secured creditor will have no need to prove for the balance of the amount due to him. Should the proceeds be insufficient to meet the full amount due to the secured creditor, the balance amount may be small enough so as not to substantially affect the shares of the unsecured creditors in the remaining assets of the debtor, should the secured creditor choose to prove for the balance due to him.

[38] When the Legislature amended the BA to include (2A) into s 8, it was fully aware of the effect of the provisions of the law that was then in force. Based on the pre-amended provisions Malaysian courts had consistently taken the view that a secured creditor who choose not to prove in the bankruptcy of the debtor should not be deprived of the interest which the contract allows.

[39] The Legislature clearly was fully cognizant of the effect of the provisions of the prevailing laws prior to the insertion of sub-s (2A) into s 8 and had

deliberately set out to change the law. The Legislature however had not deemed it fit to change the other referral and related provisions as submitted by the appellant's counsel.

[40] In our considered opinion the mischief and rationale for the insertion of sub-s (2A) into s 8 of the BA, as evident from the explanation given by the Minister in moving the amendments to the BA for its second reading in the Dewan Rakyat on 14 May 1992, was, by reason of the law as it then stood, enabled some secured creditors to take an inordinately long time to realise the property resulting in the debtor having to continue to bear interest until the sale is completed. This was to be considered to be unfair to unsecured creditors and to the debtors. The speech of the honorable Minister in moving the amendment to the BA in respect of s 8 was as follows:

> … Seterusnya pindaan adalah juga dicadangkan dibuat kepada Seksyen 8 bagi memperuntukkan bahawa tiada apa-apa bunga boleh dibayar kepada pemiutang bercagar jika sekiranya pemiutang tersebut gagal menghasilkan cagarannya dalam tempoh 6 bulan dari tarikh perintah penerimaan dibuat. Rasionalnya ialah pada amalan biasa dan berdasarkan peruntukan yang sedia ada, didapati segolongan pemiutang bercagar mengambil masa yang terlalu lama untuk menghasilkan harta tersebut. Manakala bunga yang perlu dibayar oleh penghutang berterusan sehinggalah jualan dilaksanakan. Perbuatan sedemikian adalah tidak adil kepada pemiutang yang tidak bercagar dan juga kepada penghutang.

[41] Thus, although a secured creditor under sub-s 8(2) of the BA was free to deal with his security, with the insertion of the sub-s (2A) into s 8, the chargee must realise their security promptly within six months of the receiving order failing which the chargee cannot claim any interest.

[42] Decisions of the courts prior to sub-s (2A) being introduced into s 8 of the BA, or does not involve any issue arising from s 8(2A), would accordingly be of little, if any, assistance to us, in making a considered decision in this case. The duty of the courts is to make a construction to cure the mischief and advance the remedy. It is not our duty either to add or to take away the meaning of the words of a statute unless there are good reasons for thinking that the Legislature had intended to limit its operation.

[43] For the courts to limit the application of a certain provision when the Legislature had failed to express such an intention would be to usurp the functions of the Legislature which is not within the competence of the courts to do. The duty of the courts is to give full effect to the language of the law. The function of the courts is to construe the language of the referral and related provisions as they stand, to give effect to the purpose of enacting the provision, and the mischief which existed which the Legislature sought to eliminate.

[44] Section 4(1) and (2) of the Civil Law Act 1972 is the provision relating to the administration of insolvent estates and winding up of companies. It provides as follows:

> 4. Administration of insolvent estates, and winding up of companies.
>
> (1) In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt,
>
> (2) All persons who, in any such case, would be entitled to prove for and receive dividends, out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of the estate, or under the winding up of the company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

[45] The provisions of the BA in relation to the debts of a bankrupt are clearly applicable to an insolvent company by virtue of s 291(1) and 291(2) of the Companies Act. It provides as follows:

> Subdivision (2) — Proof and Ranking of Claims
>
> 291. Proof of debts
>
> (1) In every winding up, subject in the case of insolvent companies to the application in accordance with this Act of the law relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.
>
> (2) Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may

A come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

[46] Section 8, and in particular, sub-s (2A) of the BA, are clear and unambiguous. In the absence of an express provision limiting its application, there is no reason to limit its application only against a bankrupt and not to a wound up debtor. We are in agreement with the Court of Appeal that upon a true construction of s 4(1) and (2) of the Civil Law Act 1956, s 291(1) and (2) of the Companies Act, s 8(2A) of the BA is equally applicable to a secured creditor in relation to a winding up situation.

[47] The answers to Questions 1 and 2 posed by the appellant are therefore in the affirmative.

[48] On the issue of a secured creditor's right to interest being limited up to a period of only six months as found by the Court of Appeal, the facts of this case show that the bank had filed the civil suit against Transbay in 2001, obtained judgment on 22 August 2003; filed a foreclosure action of the charged property way back in 2002 and obtained an order for sale on 7 October 2003; filed an application to wind up Transbay in 2005 and obtained a winding up order on 27 January 2006. The bank however only managed to sell the said property by way of a tender exercise on 22 July 2008.

[49] Based on our reading of s 8(2A), a secured creditor is given a timeline of six months to sell the charged property failing which they are not entitled to interest. Since the charged property was realised some two years six months after the winding up of Transbay, the bank had failed to meet the statutory limit of six months under s 8(2A) of the BA. As such the bank should not be entitled to any interest. The Court of Appeal had therefore erred in allowing interest for period a six months.

[50] The question posed by Pilecon Realty is thus answered in the negative.

[51] For the above reasons the bank's appeals are dismissed and Pilecon Realty cross-appeals are allowed with costs.

Appeals dismissed and cross-appeals allowed with costs.

Reported by Afiq Mohamad Noor